IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6367 OF 2006

Muhammed Nensey .. Petitioner.
Vs.
Ellaham Nensey .. Respondent.

Mr.A.H.Palekar for the petitioner.
Mr.Sanjay Bhatia for the respondent.

CORAM : D.B.BHOSALE, J.

DATED : 12TH OCTOBER, 2006

P.C.:

. Heard learned counsel for the petitioner and the respondent.

2. By this writ petition, the petitioner has impugned the following observations made by the family court while rejecting the application at Exhibit-58 filed by the respondent-wife under Order 39 Rule 2 of C.P.C. seeking certain directions against the petitioner-husband. The relevant observations read thus:

> . "At the same time by way of abandon caution to avoid further multiplicity of this ongoing lis, it is directed that whenever in future petitioner intends to take the child out of Bombay, he should do so with the prior leave of the court. Order accordingly."

3. Mr.Palekar, learned counsel for the petitioner submits that all the prayers in the application at Exhibit-58 have been rejected and while rejecting the

application, the family court had no reason to make aforesaid observations by which the family court has virtually modified the consent terms filed before the Division Bench of this Court on 19.11.1998 in Appeal No.947 of 1998 in Interim Custody Petition no.14 of 1998 in Custody Petition No.13 of 1998. I perused the consent terms dated 19.11.1998 and in particular clause 1(A), 1(B), 1(C) and paragraph 4 thereof. It appears that the respondent-wife had applied for modification of the consent terms before this court in Interim Petition (Lodging) No.186 of 1999 in Custody Petition No.13 of 1998. This court after recording the reasons in the order and in particular paragraph 8 and 9 thereof had refused to interfere with the consent terms signed by the parties. Thereafter the petitioner filed application at Exhibit-58 making following prayers:

> "(a) pending the hearing and final disposal of the Petition, that this Hon'ble Court be pleased to pass an Order of Injunction restraining the Petitioner, his Agents and/or Servants from removing the child Omkar from the Custody of Respondent and/or removing the child Omkar from the jurisdiction of this Hon'ble Court.
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> (b) pending the hearing and final disposal of the Petition, that this Hon'ble Court be pleased to pass an Order interalia issue the necessary direction to the various Immigration authorities at Bombay, Calcutta, Delhi, Chennai, Bangalore, etc. interalia directing them to impound the Passport of child "OMKAR" Mohammed Nensey" in the event of his leaving the Country with Petitioner or otherwise.
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> (c) pending the hearing and final disposal

of the Petition, that this Hon'ble Court be pleased to direct the Petitioner to execute necessary undertaking to the Hon'ble Court and/or deposit Passport of child Omkar and also of the Petitioner in this Hon'ble Court.

(d) Cost of the application be provided for.

4. The family court has rejected the application at Exhibit-58 by the impugned order, however, by way of abandon caution to avoid further multiplicity of the proceedings directed the petitioner-husband to seek permission of the court whenever he desires to take the child out of Mumbai. Admittedly, there was no such condition in the consent terms filed on 19th November, 1998 and since then admittedly there were several occasions for the petitioner-husband to take the child out of Mumbai without any difficulty. Mr.Bhatia, learned counsel for the respondent expressed an apprehension that the petitioner being a citizen of Australia there is every possibility that he may take the child out of India and, therefore, such condition is necessary. In my opinion, in the consent terms dated 19.11.1998, the care of such apprehension has already been taken by putting such restriction in paragraph 4 of the consent terms. Insofar as the impugned restriction put by the court on the petitioner-husband even for taking child out of Mumbai, in the facts and circumstances of the case, is unreasonable and cannot be sustained. The learned

counsel for the petitioner in all fairness, on instructions has agreed that the petitioner shall keep the respondent-wife informed the place whenever he takes the child out of Mumbai. He further states that while taking the child out of Mumbai he will also give mobile number to the respondent-wife on which she will be able to speak to the child whenever she desires. He has also placed on record an undertaking dated 9.10.2006 stating that the child does not hold the passport and he has not applied for the passport to the passport authority either in India or in Australia. The undertaking is taken on record and marked "X" for identification. The undertaking is accepted. In the circumstances the observations quoted in paragraph 2 of the order are quashed and set aside".

5. The petitioner is, allowed to take the child out of Mumbai in vacations. He shall keep the respondent-wife informed about their whereabouts and also give the mobile number to the respondent-wife on which she would be allowed to contact her child whenever she desires.

. With these observations the writ petition is disposed of.

(D.B.Bhosale, J.)